# Tan Sri Musa Hj Aman v Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor and another case

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NOS BKI-24NCvC-56–6 OF 2018 (HC2) AND BKI-24NCVC-57/6 OF 2018 (HC2)
YEW JEN KIE J
22 NOVEMBER 2018

*Constitutional Law — Executive — Dismissal of — Chief Minister — Sabah Governor requested Sabah Chief Minister to tender resignation of his Cabinet under art 7(1) of Sabah's Constitution when six state assemblymen in the ruling coalition defected to the opposition — Whether Governor was entitled to conclude from the statutory declarations of the six defecting assemblymen that Chief Minister had lost the confidence of the majority of the members of the State Assembly — Whether the passing of a vote of no-confidence against the Chief Minister in the assembly was not the only way loss of confidence in the Chief Minister could be determined — Whether Chief Minister's refusal to tender resignation required under art 7(1) of Sabah Constitution resulted in he and his Cabinet being deemed to have vacated their offices — Whether the word 'shall' in art 7(1) had mandatory effect*

The instant judgment concerned two originating summonses ('OS 56' and 'OS 57') filed by two separate plaintiffs which were heard together. In OS 56, the plaintiff, Tan Sri Musa Hj Aman ('Tan Sri Musa') challenged the validity of his dismissal as Chief Minister of Sabah by the Yang di-Pertua Negeri of Sabah ('the Governor') and the constitutionality of the appointment of Datuk Seri Mohd Shafie bin Hj Apdal ('Shafie') to replace him as the Chief Minister. In OS 57, the plaintiff, Datuk Jahid @ Noordin bin Jahim, challenged the constitutionality of his dismissal as Minister of Local Government and Housing under Tan Sri Musa's state cabinet as well as Shafie's appointment as Chief Minister in place of Tan Sri Musa. In the 14th General Election ('GE-14') held on 9 May 2018, a coalition of eight political parties contesting under the banner of Barisan Nasional of Sabah ('BN-Sabah') led by Tan Sri Musa, won 29 of the 60 seats in the Sabah State Legislative Assembly ('the assembly'). Another coalition of three political parties led by Shafie ('the Shafie camp') also won 29 seats. The remaining two seats were won by Parti Solidariti Tanah Airku ('STAR/Solidariti'). When STAR/Solidariti broke the stalemate by declaring its support for BN-Sabah, Tan Sri Musa, with the consensus of all parties involved, was formally sworn in as Chief Minister of Sabah by the Governor. Members of his State Cabinet were thereafter sworn in. Tan Sri Musa requested the Governor to also formalise the appointment of six

additional nominated members to the state assembly but the Governor refused to do so. Two days later, six BN-Sabah state assemblymen declared their support for the Shafie camp. After personally interviewing the six persons, and studying the statutory declarations they had deposed, to satisfy himself that their defection was genuine, the Governor informed Tan Sri Musa that as the defection had resulted in the Shafie camp obtaining the majority number of seats in the assembly, Tan Sri Musa no longer enjoyed the confidence of the majority of the members of the assembly and, pursuant to art 7(1) of the Sabah State Constitution, he and his Cabinet should resign. Tan Sri Musa refused to resign. Nevertheless, the Governor proceeded to formally swear in Shafie as Chief Minister to replace Tan Sri Musa. In OS 56, Tan Sri Musa sought a number of declarations including that he was still the lawful Chief Minister; that the purported revocation of his appointment and the appointing of Shafie in his place contravened the Sabah State Constitution and were void and that all acts and things done by Shafie as Chief Minister were equally void. The plaintiff in OS 57 sought similar declarations in addition to a declaration that he was still the lawful Minister of Housing and Local Government in the State Cabinet.

**Held**, dismissing both OS 56 and OS 57:

(1) BN-Sabah was a coalition of various political parties not unlike the coalition led by Shafie, albeit in the latter case it was not a registered entity and each party contested under its own symbol. It was a fact that with both coalitions winning 29 seats each, neither coalition had won the majority for them to form a coalition government. Since no single political party had won a majority of the elected seats in the assembly in GE-14 whereby its leader could claim that he was likely to command the confidence of the majority of the members of the assembly, cl (7) of art 6 of the Sabah Constitution did not come into play and was not applicable when the Governor exercised his discretion under art 6(3) to appoint the Chief Minister (see paras 27 & 29).

(2) Tan Sri Musa's argument that he could still continue as Chief Minister even after the defection of the six assemblymen from BN-Sabah because it still retained 23 assemblymen as compared to 21 assemblymen of PWS was untenable. It was unarguable that with the defection of the six assemblymen, Shafie's coalition had 35 seats compared to BN-Sabah's 23, which clearly showed that Tan Sri Musa had lost the confidence of the majority of the elected members of the assembly (see para 30).

(3) On the authority of the Federal Court's decision in *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464, ('the *Perak* case') the Governor was entitled to rely on extraneous sources, apart from a vote of

no-confidence in the assembly, to determine whether Tan Sri Musa had ceased to command the confidence of the majority of the members of the assembly. Based on the statutory declarations affirmed by the six BN-Sabah assemblymen who had pledged their allegiance to Shafie, the Governor was convinced that Tan Sri Musa had lost the confidence of the majority. This triggered art 7(1) of the Sabah Constitution pursuant to which the Governor requested Tan Sri Musa to tender the resignation of the members of his Cabinet. Upon Tan Sri Musa's refusal to do so, the members of the Cabinet, including Tan Sri Musa and the plaintiff in OS 57, were deemed to have vacated their positions (see para 88).

(4) The legal principles established by the *Perak* case clearly applied to the instant case as the *Perak* case was concerned with the interpretation of art XVI(6) of the Perak State Constitution which was identical to art 7(1) of the Sabah Constitution. Like art XVI(6), art 7(1) of the Sabah Constitution did not expressly say that there had to be a vote of no-confidence against the Chief Minister in the assembly in order to determine that he had lost the confidence of the majority of the members in the assembly. The *Perak* case held that nothing in art XVI(6) or anywhere else in the Perak Constitution stipulated that loss of confidence in the Chief Minister could only be established through a no-confidence vote in the assembly. Evidence of such loss of confidence could be gathered from other properly-established extraneous sources such as, in the instant case, the statutory declarations made by the six BN-Sabah assemblymen who had defected to the Shafie camp (see paras 56–57, 59, 61 & 66).

(5) Following the decision in the *Perak* case, the word 'shall' in art 7(1) of the Sabah Constitution had to be given a mandatory effect and it was incumbent upon Tan Sri Musa on having lost the confidence of the majority of the members of the assembly, to tender the resignation of the State Cabinet, which included the Chief Minister. His refusal to resign after being requested to do so by the Governor clearly went against the express provisions of art 7(1). Since Tan Sri Musa refused to tender the resignation of his Cabinet under art 7(1), he and the members of his Cabinet were deemed to have vacated their respective offices, paving the way for a new Cabinet to be formed. As such, the dissolution of the State Cabinet under art 7(1) did not involve the Governor or, necessarily, the members of the assembly. The issue that the Governor had acted ultra vires by dismissing Tan Sri Musa did not arise as the Chief Minister was deemed to have vacated his post when he refused to tender his resignation. Hence, the subsequent appointment of Shafie as Chief Minister was not ultra vires or null and void and did not give rise to a situation of there being two Chief Ministers (see paras 69–71 & 73).

(6) There was no merit to Tan Sri Musa's assertion that he lost his majority due to the Governor's refusal to heed his advice to appoint the six additional nominated members to the assembly. The legal position was that the six nominated members would not be taken into account in determining whether the Chief Minister had commanded the confidence of the majority of the members in the assembly (see paras 77–78).

**[Bahasa Malaysia summary**

Penghakiman ini berkenaan dengan dua saman pemula ('OS 56' dan 'OS 57') yang difailkan oleh dua plaintif berasingan yang didengar bersama. Dalam OS 56, plaintif, Tan Sri Musa Hj Aman ('Tan Sri Musa') mencabar kesahihan pemecatannya sebagai Ketua Menteri Sabah oleh Yang di-Pertua Negeri Sabah ('Gabenor') dan keperlembagaan pelantikan Datuk Seri Mohd Shafie bin Hj Apdal ('Shafie') untuk menggantikan beliau sebagai Ketua Menteri. Dalam OS 57, plaintif, Datuk Jahid @ Noordin bin Jahim, mencabar keperlembagaan pemecatannya sebagai Menteri Perumahan dan Kerajaan Tempatan di bawah Kabinet negeri Tan Sri Musa serta pelantikan Shafie sebagai Ketua Menteri sebagai pengganti Tan Sri Musa. Pada Pilihan Raya Umum Ke-14 ('GE-14') yang diadakan pada 9 Mei 2018, satu gabungan lapan parti politik yang bertanding di bawah bendera Barisan Nasional Sabah ('BN-Sabah') yang dipimpin oleh Tan Sri Musa, memenangi 29 daripada 60 kerusi di Dewan Undangan Negeri Sabah ('dewan'). Satu lagi gabungan tiga parti politik yang dipimpin oleh Shafie ('kem Shafie') juga memenangi 29 kerusi. Dua lagi kerusi dimenangi oleh Parti Solidariti Tanah Airku ('STAR/Solidariti'). Apabila STAR/Solidariti memecahkan kebuntuan dengan mengisytiharkan sokongannya kepada BN-Sabah, Tan Sri Musa, dengan persetujuan semua pihak yang terlibat, secara rasmi mengangkat sumpah sebagai Ketua Menteri Sabah oleh Gabenor. Anggota Kabinet Negeri beliau selepas itu mengangkat sumpah. Tan Sri Musa meminta Gabenor untuk juga memformalkan pelantikan enam anggota dicalonkan tambahan kepada dewan undangan negeri tetapi Gabenor enggan berbuat demikian. Dua hari kemudian, enam ahli dewan negeri BN-Sabah mengisytiharkan sokongan mereka terhadap kem Shafie. Selepas secara peribadi menemubual enam orang tersebut, dan mengkaji perisytiharan berkanun yang telah mereka bersumpah, untuk memuaskan hati dirinya bahawa penolakan mereka adalah tulen, Gabenor memaklumkan Tan Sri Musa bahawa oleh kerana penolakan telah mengakibatkan kem Shafie memperoleh majoriti bilangan tempat duduk dalam dewan, Tan Sri Musa tidak lagi mempunyai keyakinan ahli-ahli dewan dan, menurut perkara 7(1) Perlembagaan Negeri Sabah, beliau dan Kabinetnya hendaklah meletakkan jawatan. Tan Sri Musa enggan meletak jawatan. Walau bagaimanapun, Gabenor terus mengangkat sumpah Shafie sebagai Ketua Menteri untuk menggantikan Tan Sri Musa. Dalam OS 56, Tan Sri Musa memohon bebrapa pengisytiharan termasuk bahawa beliau masih Ketua Menteri yang sah; bahawa pembatalan yang dikatakan terhadap pelantikannya dan pelantikan Shafie di tempatnya menyanggah Perlembagaan Negeri Sabah

dan tidak sah dan semua perbuatan dan perkara yang dilakukan oleh Shafie sebagai Ketua Menteri sama sekali tidak sah. Plaintif dalam OS 57 meminta pengisytiharan yang sama sebagai tambahan kepada perisytiharan bahawa beliau masih Menteri Perumahan dan Kerajaan Tempatan yang sah di Kabinet Negeri.

**Diputuskan**, menolak kedua-dua OS 56 dan OS 57:

(1) BN-Sabah adalah gabungan pelbagai parti politik tidak seperti gabungan yang dipimpin oleh Shafie, walaupun dalam kes itu, ia bukan merupakan entiti yang berdaftar dan setiap parti bertanding di bawah simbolnya sendiri. Adalah satu kenyataan bahawa dengan kedua-dua gabungan itu memenangi 29 kerusi masing-masing, tiada gabungan yang memenangi majoriti bagi mereka untuk membentuk kerajaan gabungan. Oleh kerana tiada satu parti politik telah memenangi majoriti kerusi yang dipertandingkan dalam dewan di GE-14 di mana pemimpinnya boleh menuntut bahawa dia mungkin memegang keyakinan majoriti anggota dewan, klausa (7) perkara 6 Perlembagaan Sabah tidak terpakai apabila Gabenor melaksanakan budi bicaranya di bawah perkara 6(3) untuk melantik Ketua Menteri (lihat perenggan 27 & 29).

(2) Hujahan Tan Sri Musa bahawa beliau masih boleh terus menjadi Ketua Menteri walaupun selepas penolakan enam ahli dewan negeri dari BN-Sabah kerana masih mengekalkan 23 ahli dewan negeri berbanding 21 ahli dewan negeri PWS tidak dapat dipertahankan. Tidak dapat disangkal bahawa dengan penolakan enam ahli dewan negeri, gabungan Shafie mempunyai 35 kerusi berbanding 23 kerusi BN-Sabah, yang dengan jelas menunjukkan bahawa Tan Sri Musa telah kehilangan keyakinan majoriti anggota dewan yang dipilih (lihat perenggan 30).

(3) Atas kuasa keputusan Mahkamah Persekutuan dalam *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464, ('kes *Perak*') Gabenor berhak untuk bergantung kepada sumber luar, selain daripada undi tidak percaya dalam dewan, untuk menentukan sama ada Tan Sri Musa telah terhenti untuk memegang keyakinan kepada majoriti ahli-ahli dewan. Berdasarkan pengisytiharan berkanun yang disumpah oleh enam ahli dewan negeri BN-Sabah yang telah berjanji setia kepada Shafie, Gabenor yakin bahawa Tan Sri Musa telah kehilangan keyakinan majoriti. Ini mencetuskan perkara 7(1) Perlembagaan Sabah yang mana Gabenor meminta Tan Sri Musa untuk meletak jawatan anggota Kabinetnya. Apabila keengganan Tan Sri Musa untuk berbuat demikian, anggota Kabinet, termasuk Tan Sri Musa dan plaintif dalam OS 57, dianggap telah meninggalkan jawatan mereka (lihat perenggan 88).

(4) Prinsip undang-undang yang ditetapkan oleh kes *Perak* jelas diterapkan pada kes ini kerana kes *Perak* yang berkaitan dengan tafsiran

perkara XVI(6) Perlembagaan Negeri Perak yang sama dengan perkara 7(1) Perlembagaan Sabah. Seperti perkara XVI(6), perkara 7(1) Perlembagaan Sabah tidak menyatakan bahawa perlu ada undi tidak percaya terhadap Ketua Menteri di dalam dewan untuk menentukan bahawa dia telah kehilangan keyakinan majoriti ahli dewan. Kes *Perak* memutuskan bahawa tiada apa-apa dalam perkara XVI(6) atau di mana-mana di dalam Perlembagaan Perak menetapkan bahawa hilang keyakinan terhadap Ketua Menteri hanya boleh dibuktikan melalui undi tidak percaya dalam dewan. Bukti kehilangan keyakinan sedemikian boleh dikumpulkan dari sumber-sumber luar yang lain yang telah ditetapkan dengan baik seperti dalam kes ini, pengisytiharan berkanun yang dibuat oleh enam ahli dewan negeri BN-Sabah yang telah meninggalkan ke kem Shafie (lihat perenggan 56–57, 59, 61 & 66).

(5) Berikutan keputusan dalam kes *Perak*, perkataan 'shall' dalam perkara 7(1) Perlembagaan Sabah perlu diberi kesan mandatori dan ia adalah penyebab kepada Tan Sri Musa dalam kehilangan keyakinan majoriti anggota dewan, untuk menyerahkan peletakan jawatan Kabinet Negeri, termasuk Ketua Menteri. Penolakannya untuk meletak jawatan selepas diminta berbuat demikian oleh Gabenor dengan jelas menentang peruntukan nyata perkara 7(1). Oleh kerana Tan Sri Musa enggan meletak jawatan Kabinetnya di bawah perkara 7(1), beliau dan ahli Kabinetnya dianggap telah mengosongkan pejabat masing-masing, membuka jalan bagi kabinet baru untuk dibentuk. Oleh itu, pembubaran Kabinet Negeri di bawah perkara 7(1) tidak melibatkan Gabenor atau anggota dewan. Isu bahawa Gabenor telah bertindak ultra vires dengan menolak Tan Sri Musa tidak muncul kerana Ketua Menteri dianggap telah mengosongkan jawatannya apabila dia enggan memohon peletakan jawatannya. Justeru, pelantikan Shafie sebagai Ketua Menteri adalah tidak ultra vires atau batal dan tidak sah dan tidak menimbulkan keadaan di mana terdapat dua Ketua Menteri (lihat perenggan 69–71 & 73).

(6) Tiada merit kepada dakwaan Tan Sri Musa bahawa beliau kehilangan majoritinya kerana keengganan Gabenor untuk mendengar nasihatnya untuk melantik enam calon anggota tambahan kepada dewan. Kedudukan undang-undang adalah bahawa enam anggota yang dicalonkan tidak akan diambil kira dalam menentukan sama ada Ketua Menteri telah memegang keyakinan majoriti ahli dalam dewan (lihat perenggan 77–78).]

**Notes**

For cases on dismissal of, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2751–2756.

**Cases referred to**

*Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

*Dato Menteri Othman Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29; [1984] 1 CLJ 28; [1984] 1 CLJ Rep 98, FC (refd)

*Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464; [2009] 5 CLJ 265, CA (not folld)

*Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285; [2010] 2 CLJ 925, FC (refd)

*Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v Dato' Dr Zambry Abdul Kadir* [2009] 1 LNS 316, HC (refd)

*Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah & Ors* [1995] 1 MLJ 169; [1995] 1 CLJ 184, HC (refd)

*Datuk Syed Kechik Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors And Another Application* [1999] 1 MLJ 257; [1999] 1 CLJ 325, FC (refd)

*Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] 3 MLJ 543; [2017] 3 CLJ 88, CA (refd)

*Jogendra Nath Hazarika v State of Assam And Ors* AIR 1982 Gau 25, HC (refd)

*Mahabir Prasad Sharma v Prafulla Chandra Ghose And Ors* AIR 1969 Cal 198, HC (refd)

*R v Secretary of State for the Home Department* [1999] 1 AC 450, HL (folld)

*Stephen Kalong Ningkan v Tun Abang Hj Openg & Tawi Sli* [1966] 2 MLJ 187; [1966] 1 LNS 186, HC (refd)

*Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420 (refd)

*Yong Teck Lee & Ors v The Prime Minister of Malaysia, Najib bin Razak & Anor* [2018] MLJU 790; [2018] 1 LNS 787, HC (refd)

**Legislation referred to**

Interpretation Ordinance s 21

Perak Constitution arts 1 XVIII(2), XVI(6)

Sabah State Constitution arts 1, 5, 6, 6(1), (2), (3), (7), 7, 7(1), 8, 10, 10(1), (2), (2)(a), (3), (4), 14(1)(c), 18(2)(d), 21

Statutory Declaration Act 1960 Schedule

*Tengku Ahmad Fuad BTA Burhanuddin (FT Ahmad & Co); S Vanugopal (S Vanugopal & Partners) for the plaintiff.*

*Zaleha Rose Hj Pandin (Dgku Fazidah Hatun Pg Bagul, M Hanafiah M Kassim and Rafidah Maqbool Rahman with her) (Sabah State Attorney-General's Chambers) for the first defendant.*

*Douglas Lind (Lind Willie Wong & Chin) for the second defendant.*
*Brendan Soh (Roger Chin with him) watching brief for the Sabah Law Society.*

**Yew Jen Kie J:**

INTRODUCTION

**[1]** In BKI-24NCvC-56/6 of 2018 ('OS 56'), the plaintiff, Tan Sri Musa bin Hj Aman, is challenging the validity of his dismissal as the Chief Minister of the State of Sabah by the first defendant, the Yang di-Pertua Negeri or the Governor of the State of Sabah ('the TYT') and the constitutionality of the subsequent appointment of the second defendant Datuk Seri Mohd Shafie bin Hj Apdal as the Chief Minister to replace him.

**[2]** In BKI-24NCvC-57/6 of 2018 ('OS 57'), the plaintiff Datuk Jahid @ Noordin bin Jahim is, inter alia, also challenging the constitutionality of the appointment of the first defendant Datuk Seri Mohd Shafie bin Hj Apdal as the Chief Minister to replace Tan Sri Musa Hj Aman and his dismissal as Minister of Local Government and Housing.

**[3]** By order of the court dated 18 July 2018, it was ordered that OS 56 and OS 57 are to be heard together.

OS 56

**[4]** In OS 56, the plaintiff sought the following declarations:

(a) that the plaintiff is and remains the lawful Chief Minister of Sabah.

(b) That there was no lawful revocation, removal or dismissal by the 1st Defendant of the plaintiff's appointment as Chief Minister of Sabah.

(c) That the 1st Defendant's act or acts subsequent to the plaintiff's appointment as Chief Minister with respect to the 2nd Defendant's purported appointment as Chief Minister are ultra vires the Constitution of the State of Sabah (the 'State Constitution'), are null and void and of no effect.

(d) That the 1st Defendant acted unconstitutionally in appointing the 2nd Defendant's State Cabinet.

(e) That the 1st Defendant's failure neglect and/or refusal to appoint the plaintiff's nominated Assemblymen as advised by the plaintiff was unconstitutional and contrary to the State Constitution.

(f) That all acts and things done by the 2nd Defendant and/or his purported Cabinet after his purported appointment as the purported Chief Minister are null, void and of no effect.

(f-1) That all acts effected and/or done by the 1st Defendant in his capacity as the

head of State for Sabah where such acts are effected and/or done pursuant to the advice of the 2nd Defendant are void and/or voidable on the ground of illegality upon the option of the plaintiff.

(f-2) That any and all sittings of the Sabah State Legislative Assembly where such sittings are convened upon the advice of the 2nd Defendant are void and/or voidable on the ground of illegality upon the option of the plaintiff and consequently a declaration that all acts, motions or other business done or effected therein are void and/or voidable on the option of the plaintiff.

(g) Damages against the 1st and 2nd Defendants to be assessed.

(h) Discretionary interest of 5%pa pursuant to Section 11 of the Civil Law Act, 1956 on the Judgment sum from the filing of the Writ until the date of the Judgment and statutory interest of 5%pa from the date of judgment until the date of full realization.

(i) Costs.

(j) Such further or other reliefs that this Honourable Court deems fit and proper to grant.

## BACKGROUND FACTS

*The appointment of the plaintiff as the Chief Minister*

**[5]** In the 14th General Election ('GE-14') held on 9 May 2018, for the State of Sabah, 60 state constituencies were offered to be contested for election of members of the Sabah State Legislative Assembly ('the assembly') and the results of the GE-14 for the State of Sabah are as follows:

(a) Barisan Nasional of Sabah ('BN-Sabah') led by the plaintiff, a coalition comprising of eight political parties, namely, United Malay National Organization ('UMNO'), Parti Bersatu Sabah ('PBS'), United Pasokmomogon Kadazandusun Murut Organization ('UPKO'), Liberal Democratic Party ('LDP'), Parti Bersatu Rayat Sabah ('PBRS'), Malaysian Chinese Association ('MCA'), Parti Gerakan Rakyat Malaysia ('Gerakan') and Malaysia Indian Congress ('MIC'), won 29 Sabah State Constituencies, including the plaintiff's State Constituency of N42 Sungai Sibuga;

(b) another coalition led by the second defendant, made up of Parti Warisan Sabah ('PWS'), Democratic Action Party ('DAP') and Parti Keadilan Rakyat ('PKR'), won 29 seats, with Parti Warisan winning 21 seats, DAP six seats and PKR two seats; and

(c) Parti Solidariti Tanah Airku ('STAR/ Solidariti') led by Datuk Dr Jeffrey Kitingan won two seats.

**[6]** On 9 May 2018, STAR/Solidariti declared its support for the formation of a coalition government with BN-Sabah. This coalition constituted a simple majority of 31 seats out of 60 seats and it gave the plaintiff the command of the majority of the assembly.

**[7]** Pursuant to art 6(3) of the Sabah State Constitution ('the Sabah Constitution'), on 10 May 2018 at around 11pm the plaintiff, who had secured the support of the two assemblymen from STAR/Solidariti to command the majority of the members of the assembly, was sworn in as the Chief Minister by the first defendant. The swearing ceremony was witnessed by the Chief Justice of Sabah and Sarawak and in the presence of the State Secretary, the State Attorney General and other state dignitaries, government officials and invited guests.

**[8]** According to the plaintiff, his appointment as the Chief Minister only took place after the first defendant had exhaustively interviewed the various assemblymen elected from BN-Sabah and STAR/Solidariti and after they affirmed and re-affirmed their confidence in him.

**[9]** The first defendant has a different version. He said that the appointment of the plaintiff was done under duress in respect of which a police report was lodged.

**[10]** Learned State Attorney General for the first defendant and learned counsel for the second defendant indicated to the court that they are not pursuing the first defendant's allegation of appointing the plaintiff under duress in this originating summons. As such, the alleged duress is a non-issue for the purpose of this originating summons.

**[11]** Pursuant to art 6(1), (2) and (3) of the Sabah Constitution, immediately after the plaintiff was sworn in as the Chief Minister, the first defendant acting on the advice of the plaintiff in his capacity as a Chief Minister, sworn in the State Cabinet, which was witnessed by the Chief Justice of Sabah and Sarawak and in the presence of the State Secretary, the State Attorney General and other state dignitaries, government officials and invited guests.

**[12]** After the swearing in of the State Cabinet, pursuant to art 14(1)(c) of the Sabah Constitution, the plaintiff handed to the first defendant six *watikah perlantikan* ('instruments of appointment') for the appointment of six additional nominated members of the assembly ('nominated members') and advised the first defendant in his capacity as the TYT to execute the same. However, first defendant refused and failed to execute the instrument of appointment of six nominated members.

A THE DISPUTE

**[13]** The plaintiff averred in his affidavit in support (encl 2 of OS 56) that on 12 May 2018 at 10am, amid the rumors and social media reports that some members of UPKO had shifted their allegiance, the plaintiff, upon being summoned by the first defendant, went to the Istana to have an audience with the first defendant. At the meeting the first defendant asked the plaintiff to resign as Chief Minister. In reply, the plaintiff insisted that the first defendant execute the six instruments of appointment and that he would not resign. After additional discourse and discussion, the first defendant told the plaintiff 'whether you resign or not, I am going to swear in Shafie ie, the second defendant at 9pm tonight'. At no time did the plaintiff offer, tender or otherwise indicate his resignation as Chief Minister nor did he request a dissolution of the assembly. However, on the night of 12 May 2018 at about 9pm, the first defendant sworn in the second defendant as the Chief Minister of Sabah with the Chief Justice of Sabah and Sarawak and other state officials to witness the purported swearing in ceremony.

**[14]** In the affidavit in opposition (encl 8 of OS 56) affirmed by the first defendant, the first defendant averred that based on his personal interview of the six BN Assemblymen who defected and the six statutory declarations executed by the said six assemblymen (exhs TYT3 to TYT8 of encl 8 of OS 56) who declared and affirmed their full support for the second defendant, he was convinced that the majority of the assemblymen had on 11 May 2018 switched their allegiance to the second defendant, who then commanded a simple majority of 35 seats of the assembly. Hence, pursuant to art 7(1) of the Sabah Constitution, he summoned the plaintiff to the Istana on 12 May 2018 at 10.05am and asked him to tender his resignation as Chief Minister together with the members of the Cabinet as the plaintiff had ceased to command the confidence of the majority of the members of the assembly. However, the plaintiff refused to comply with his instruction. Thereafter, in exercise of his personal discretion conferred under art 6(3) read together with art 10(2)(a) of the Sabah Constitution, the first defendant appointed the second defendant as the Chief Minister of the State of Sabah on 12 May 2018.

**[15]** The first defendant issued a letter to the plaintiff on 12 May 2018 (exh TYT9 of encl 8) stating that since the plaintiff no longer commanded the confidence of the majority of the members of the assembly then the plaintiff shall tender the resignation of the members of the Cabinet pursuant to art 7(1) of the Sabah Constitution. Exhibit TYT9 was only served to the plaintiff's representative cum confidential secretary, Effendi Mohd Sunon, on 14 May 2018 as 12 May 2018 was a Saturday and also because the plaintiff could not

be reached at that time.

**[16]** On 16 May 2018, on the advice of the second defendant as the Chief Minister, the first defendant appointed the other members of the State Cabinet. Both swearing in ceremonies were conducted in the presence of the Chief Justice of Sabah and Sarawak and the state officials and invited guests.

ISSUES FOR DETERMINATION

**[17]** Gleaning from the declarations sought by the plaintiff, I opined that the issues for determination are essentially as follows:

(i) whether the first defendant was acting within his constitutional power when he purportedly dismissed the plaintiff as Chief Minister? and

(ii) whether the first defendant's appointment of the second defendant as the Chief Minister is ultra vires, null and void?

**[18]** Related issues:

The determination of issue (i) entailed the consideration of the following subsidiary issues:

(a) whether the plaintiff had lost the confidence of the majority of the assembly?

(b) whether a vote of no-confidence is the only way to determine that the plaintiff has lost the confidence of the majority of the members of the assembly?

(c) whether there is extraneous resource in support of the plaintiff's loss of confidence of the majority of the members of the assembly? and

(d) whether, by the plaintiff's refusal to resign, he is deemed to have vacated the Chief Minister post?

THE LAW

**[19]** For ease of reference, I have reproduced below the relevant provisions in the Sabah Constitution which are pertinent to consider the issues at hand:

(a) art 1 of the Sabah Constitution provides:

> (1) There shall be a Head of State for Sabah, to be called the Yang di-Pertua Negeri, who shall be appointed by the Yang di Pertua Agong acting in his discretion but after consultation with the Chief Minister.

(b) art 5 of the Sabah Constitution provides:

> The executive authority of the State shall be vested in the Yang di-Pertua Negeri but executive functions may by law be conferred on other persons.

(c) art 6 of the Sabah Constitution provides:

> (1) There shall be a State Cabinet to advise the Yang di-Pertua Negeri in the exercise of his functions.
>
> (2) The Cabinet shall consist of a Chief Minister, and not more than ten nor less than four other members, (to be styled 'Ministers') appointed in accordance with clause (3).
>
> (3) The Yang di-Pertua Negeri shall appoint as Chief Minister a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of the members of the assembly and shall appoint the other members mentioned in cause (2) in accordance with the advice of the Chief Minister from among the members of the assembly.
>
> (4) ...
>
> (5) ...
>
> (6) The Cabinet shall be collectively responsible to the Legislative Assembly.
>
> (7) For the purpose of clause (3) of this Article, where a political party has won a majority of the elected seats of the Legislative Assembly in a general election the leader of such political party, who is a member of the Legislative Assembly shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the assembly.

(d) art 7 of the Sabah Constitution provides:

> (1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.
>
> (2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall also vacate his office if his appointment thereto is revoked by the Yang di-Pertua Negeri acting in accordance with the advice of the Chief Minister.
>
> (3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di- Pertua Negeri.

(e) art 8 of the Sabah Constitution provides:

> Before a member of the Cabinet exercises the functions of his office he shall take and subscribe in the presence of the Yang di-Pertua Negeri the oath set out in Part II of the First Schedule.

(f) art 10 of the Sabah Constitution provides:

(1) In the exercise of his functions under this Constitution or any other law, or as a member of the Conference of Rulers, the Yang di- Pertua Negeri shall act in accordance with the advice of the Cabinet or of a member thereof acting under the general authority of the Cabinet, except as otherwise provided by the Federal Constitution or this Constitution; but shall be entitled, at his request, to any information concerning the government of the State which is available to the Cabinet.

(IA) In the exercise of his functions under this Constitution or any other law or as a member of the Conference of Rulers, where the Yang di-Pertua Negeri is to act in accordance with the advice or on advice, the Yang di-Pertua Negeri shall accept and act in accordance with such advice.

(2) The Yang di-Pertua Negeri may act in his discretion in the performance of the following functions:

(a) the appointment of a Chief Minister;

(b) the withholding of consent to a request for the dissolution of the Legislative Assembly.

(3) The Legislature may by law make provision for requiring the Yang di-Pertua Negeri to act after consultation with, or on the recommendation of, any person or body of persons other than the Cabinet in the exercise of any of his functions except:

(a) Functions, exercisable in his discretion; and

(b) Functions with respect to the exercise of which provision is made in the Federal Constitution or any Article of this Constitution.

(4) For removing doubts, it is hereby declared that clause (1) of this Article or otherwise clause (3) of this Article shall have effect and force on the Yang di-Pertua Negeri in performing any of his functions under this Constitution or any other law; and the Yang di-Pertua Negeri may use his discretion only when performing his functions under clause (2) of this Article and no other.

(g) art 21 of the Sabah Constitution provides:

(1) The Yang di-Pertua Negeri may from time to time summon the Legislative Assembly, and shall not allow six months to elapse between the last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Yang di-Pertua Negeri may prorogue or dissolve the Legislative Assembly.

(3) The Legislative Assembly shall, unless sooner dissolved, continue for five years from the date of its first sitting and shall then stand dissolved.

A CANON OF INTERPRETATION OF CONSTITUTION

**[20]** As the foremost of mind, I remind myself of the approach to be taken on constitutional interpretation as observed by the Federal Court in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285; [2010] 2 CLJ 925 ('the *Perak* case'), as follows:

> [26] *NS Bindra's Interpretation of Statutes*, (10th Ed) at p 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be preferred. 'The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties'. From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.
>
> [27] One other important guide in interpretation of Constitution is that, 'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous.

(See *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701.)

*Issue No (i): Whether the first defendant was acting within his constitutional power when he purportedly dismissed the plaintiff as Chief Minister?*

(a) Whether the plaintiff had lost the command of confidence of the majority of the members of the assembly?

**[21]** On behalf of the plaintiff, it was contended that when the TYT exercised his discretion under art 6(3) of the Sabah Constitution in appointing a member of the assembly who, in his judgment, is likely to command the confidence of the majority of the members of the assembly, regards must be given to cl (7) of the same article which described the member of the assembly who is likely to command the confidence of the majority of the members of the assembly as the leader of 'a political party' which has won a 'majority of the elected seats of the assembly in a general election'.

**[22]** It was contended for the plaintiff that in the absence of constitutional definition of the word 'majority' in cl (7), the word must be given its ordinary meaning, which means relative majority, which is consistent with the doctrine

of plurality, or the most number and not absolute majority, that is, the support of at least 31 members of the 60 elected members of the assembly. It was contended for the plaintiff that the Constitution being *sui generis* and being a living document calls for a broad interpretation, citing *Dato Menteri Othman Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29; [1984] 1 CLJ 28; [1984] 1 CLJ Rep 98. Article 6(7) is a unique feature. No other State Constitution including the Perak Constitution has an equivalent or similar provision as art 6(7).

**[23]** Learned counsel for the plaintiff went on to submit that when cl (7) was inserted in 1990 by Enactment No 5/1990, the Legislature did not use the word 'absolute majority' because the Legislature had the foresight of the possibility of more than two political parties contesting the election with none of the parties securing absolute majority of the assembly. This is fortified in *Stephen Kalong Ningkan v Tun Abang Hj Openg & Tawi Sli* [1966] 2 MLJ 187; [1966] 1 LNS 186 (HC) ('*Ningkan*'s case') where the learned judge observed:

> ... this probably has in mind a situation of splinter parties, as has been the case of France, when a general election could not be expected to show an overall majority for any one party.

**[24]** Learned counsel for the plaintiff submitted that as in the GE-14 held on 9 May 2018, many political parties contested in the 60 state constituencies in Sabah but, as the results showed, none of the parties had secured 31 seats. This illustrates that unless the word 'majority' in art 6(3) and (7) is given the ordinary meaning of 'the most', an impasse may well result as no single political party had won 31 seats.

**[25]** Learned counsel for the plaintiff submitted that BN-Sabah, as a registered party, had secured 29 seats of the assembly compared to the 21 seats won by PWS, 6 by DAP, 2 by PKR and 2 by STAR/Solidariti, BN-Sabah had technically won the majority or most of the seats in the assembly. Pursuant to art 6(7), the plaintiff being the leader of the political party which won the majority of the seats in the assembly is entitled to be appointed as the Chief Minister. The allegiance given by STAR/Solidariti to BN-Sabah which increased its seats to 31 merely bolstered BN-Sabah majority in the assembly, it does not detract from the fact that BN-Sabah with its 29 seats had already won the majority of the elected seats of the assembly. Even with the defection of the assemblymen from BN-Sabah, BN-Sabah led by the plaintiff continued to enjoy the support of the remaining 23 Assemblymen compared to the 21 secured by PWS.

**[26]** Learned counsel for the plaintiff next submitted that PWS, DAP and PKR, and later UPKO, were a mere coalition of political parties, unlike BN-Sabah which is a registered party led by the plaintiff and all the candidates

of the political parties contested under the symbol of 'dacing' (the scale). The coalition led by the second defendant was not registered and the individual parties contested under their own symbols. Thus, the first defendant had made a grave error by assuming that the coalition of PWS, DAP, PKR and UPKO constituted a political party.

**[27]** It is interesting to note that learned counsel for the plaintiff equated BN-Sabah to a registered political party when the plaintiff himself had averred in para 6 of his affidavit in support (encl 2) that BN-Sabah is a coalition of eight political parties, United Malay National Organization ('UMNO'), Parti Bersatu Sabah ('PBS'), United Pasokmomogon Kadazandusun Murut Organization ('UPKO'), Liberal Democratic Party ('LDP'), Parti Bersatu Rayat Sabah ('PBRS'), Malaysian Chinese Association ('MCA'), Parti Gerakan Rakyat Malaysia ('Gerakan') and Malaysia Indian Congress ('MIC'). In other words, BN-Sabah is a political coalition of various political parties which agreed to form an alliance and cooperate with one another in the general election with the common goal to form a coalition government with the collective votes they might win in the general election. It is not different from the coalition of PWS, DAP and PKR led by the second defendant, albeit it was not a registered entity and each party contested under its own symbol. It is a fact that with both coalitions winning 29 seats each, neither coalition had won the majority for them to form a coalition government.

**[28]** If the court were to agree with the plaintiff's contention that the word 'majority' in art 6(7) means 'relative majority' or the most, it would mean, from the votes secured by the political parties contesting in the GE-14 in the Sabah state constituencies, namely, 17 by UMNO, six by UPKO, six by PBS, 21 by PWS, six by DAP, two by PKR and two by STAR, PWS with its 21 seats is the political party with the largest number of seats won. By virtue of art 6(7), the second defendant, an elected member of the assembly and the leader of the political party which won a majority of the elected seats of the assembly, should be the one who is likely to command the confidence of the majority of the members of the assembly and ought to have been appointed the Chief Minister. One might then ask: is the second defendant who only had the support of 21 Assemblymen likely to command the confidence of the remaining 39 assemblymen from the other parties to form a Government? The answer must be in the negative.

**[29]** It is plainly clear that no single political party in Sabah had won a majority of the elected seats of the assembly in GE-14 whereby its leader can claim that he is likely to command the confidence of the majority of the members of the assembly. As such, cl (7) of art 6 does not come into play and was not applicable when the first defendant exercised his discretion under art 6(3) of the Sabah Constitution.

**[30]** As stated earlier, neither the BN-Sabah nor the coalition led by the second defendant won the majority of the assembly. The plaintiff's argument that the plaintiff could still continue as Chief Minister even after the defection of the six Assemblymen of BN-Sabah because it still retained 23 Assemblymen compared to the 21 Assemblymen of PWS is untenable. It is unarguable that with the defection of the six Assemblymen from BN-Sabah, the coalition led by the second defendant was increased from 29 to 35 whereas BN-Sabah's Assemblymen dropped from 29 to 23, which clearly showed that the plaintiff had lost the confidence of the majority of the elected members of the assembly.

(b) Whether a vote of no-confidence is the only way to determine that the plaintiff has lost the confidence of the majority of the members of the assembly?

**[31]** The first defendant averred in his affidavit in opposition (encl 8 of OS 56 that he was convinced that the plaintiff had lost the confidence of the majority of the members of the assembly based on the six statutory declaration (exhs TYT3 to TYT8 of encl 8 of OS 56) affirmed by the following elected assemblymen in which they declared and pledged their support to the second defendant to be appointed as the Chief Minister:

(a) YB Ewon Benedict from UPKO (Constituency of Kadamaian N7);

(b) YB Datuk Abidin Madingkir from UPKO (Constituency of Paginatan N31);

(c) YB Datuk Hamisa Samat from UMNO (Constituency of Tanjung Batu N59);

(d) YB Datuk Abdul Muis Picho from UMNO (Constituency of Sebatik N60);

(e) YB Datuk Osman Jamal from UMNO (Constituency N55); and

(f) YB Jamawi bin Jaafar from UMNO (Constituency of Kemabong N36).

**[32]** For the first and second defendant, it was contended that a no-confidence vote by the members of the assembly is not the only way to determine that the plaintiff has lost the confidence of the majority of the members of the assembly. The first defendant can form his judgment by relying on extraneous sources, citing the *Perak* case in support of his contention.

**[33]** Learned counsel for the plaintiff submitted that applying the principles of constitutional interpretation, Sabah Constitution when read as a whole, purposively and in context together with the structure and aims of Sabah Constitution, it is clear that the first defendant as TYT has no express power in

A the Sabah Constitution to dismiss the Chief Minister. The absence of express power to do so strongly indicates that the power conferred on the TYT must be narrowly confined to art 10(4) of the Sabah Constitution which made it abundantly clear that TYT may exercise his discretion only when performing his functions under cl (2) of art 10, that is: (a) appointment of Chief Minister; B and (b) withholding consent to request for dissolution of the assembly, and no other.

**[34]** Learned counsel for the plaintiff further submitted that since the Sabah C Constitution had carefully spelt out the separation of power between the Executive, Legislative and Judiciary, the TYT should follow the advice of the Chief Minister (art 10(1) and (3)). The TYT may only act on his own discretion in the two situations described in art 10(2). In this case, the first defendant had already exercised his discretion under art 10(2)(a) by appointing D the plaintiff as the Chief Minister. Once the TYT has exercised his power to appoint a Chief Minister under art 6(3), that power is spent and the Chief Minister so appointed can only be removed except and until the assembly, through its usual proceeding, expresses a loss of confidence in the Chief Minister or until the Chief Minister's post becomes vacant after a general E election.

**[35]** Learned counsel for the plaintiff submitted that Sabah as a state governed under a system of democracy, the political legitimacy of the Government of Sabah depends on the expression of people's will in the general F election. Thus, once the Chief Minister and his Cabinet had already been sworn in, the only way to determine that the Chief Minister has lost the command of the majority of the members of the assembly is via a motion for a vote of no confidence in the assembly. In the present case, TYT had usurped the function of the assembly when he decided that the plaintiff could not continue G to be Chief Minister as he had lost the confidence of the majority of the assembly members. In support, *Ningkan*'s case and *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420 ('*Tun* H *Mustapha*'s case') were cited.

**[36]** Learned counsel for the plaintiff contended at length why, notwithstanding that art XVI(6) of the Perak Constitution is pari materia with art 7(1) of the Sabah Constitution, the Perak case does not support the I defendants' case due to the following distinguishable facts and the circumstances of the case.

**[37]** Firstly, Perak has a constitutional monarchy, the Sultan of Perak is a hereditary monarch and the Laws of the Constitution of Perak ('the Perak

Constitution') has curtailed the Sultan's executive power, who previously wielded absolute executive power over the then Sultanate. However, the Sultan still has reserve power which are not expressly extinguished eg, art 1 XVIII(2) of the Perak Constitution. In contrast, the office of the TYT is the creation of Sabah Constitution and his powers are conferred by the Constitution. The TYT has no reserve power and he can only exercise his executive authority within the confines of the Sabah Constitution. The Perak Constitution does not have art 10(4) as in the Sabah Constitution which expressly limits the TYT's discretion when performing his eight functions under art 10(2) of the Sabah Constitution, to only two areas, namely: (a) appointment of the Chief Minister; and (b) withholding consent to dissolution of the assembly. Article 7(1) does not confer discretionary power on the TYT to decide on the will of the assembly or to require an incumbent Chief Minister to resign. Accordingly, the TYT under the Sabah Constitution does not have the reserve power (exercisable by the Sultan of Perak) to consider any extraneous evidence when considering whether an incumbent Chief Minister has lost the confidence of the majority members of the assembly.

**[38]** Secondly, the timing of the appointment. In the *Perak* case, the appointment of the respondent as a new Chief Minister on 6 February 2009 took place close to a year after the appointment of the appellant as the Chief Minister on 17 March 2008. Unlike the present case, there was complex political shifting with 'tro-ing and fro-ing' after the GE-14 and that complex pattern was not given time to resolve itself at the assembly because of the first defendant's decision to purportedly appoint the second defendant as a second Chief Minister.

**[39]** Thirdly, the appellant in the *Perak* case had requested the Sultan of Perak, both verbally (during the audience with the Sultan of Perak) and by writing, to dissolve the Legislative Assembly. Both the Court of Appeal and the Federal Court gave great significance to this request for dissolution as it is an undisputed admission by the appellant of loss of confidence of the majority of the members of the assembly. In contrast, the plaintiff did not request for dissolution of the assembly nor was there any admission by the plaintiff.

**[40]** Fourthly, the evidence of loss of confidence. The Sultan of Perak had undisputed evidence from the majority of members of the Legislative Assembly that the appellant had ceased to have the confidence of the majority of the assembly. In stark contrast, the situation in the present case remained fluid and uncertain. The expression of loyalty from the six Assemblymen relied on by the first defendant cannot carry the same weight as in the *Perak* case since they contradicted similar and recent declarations of support they had made to the plaintiff in less than 48 hours earlier.

**[41]** Learned counsel for the plaintiff submitted that there must exist exceptional circumstances with overwhelming evidence to justify that a TYT can require the resignation of a Chief Minister, such as in the *Perak* case, the appellant's admission of loss of confidence of the majority of the Legislative Assembly. In the present case, no such exceptional circumstances existed as the plaintiff did not request for dissolution of the assembly nor did he admit loss of confidence of the majority of the assembly.

**[42]** Learned counsel for the plaintiff also submitted that there was no reasonable time given to the plaintiff to resign, to call for dissolution or to call for the assembly to convene to determine the confidence vote. The letter dated 12 May 2018 (exh 4 TYT9 of encl 8) was only delivered on 14 May 2018, not to the plaintiff but to a purported agent of the plaintiff. The fact that exh TYT9 of encl 8 was only delivered on 14 May 2018 indicated that the second defendant was appointed as a Chief Minister when the plaintiff is still a Chief Minister. There was, thus, no request made to the plaintiff to resign as exh TYT9 of encl 8 was only delivered on 14 May 2018 and by then the first defendant had already appointed the second defendant as a new Chief Minister to replace the plaintiff.

**[43]** In respect of the submission that the plaintiff was never requested to resign as the letter dated 12 May 2018 (exh 15 TYT9 of encl 8) was only delivered on 14 May 2018, it is pertinent to refer to the plaintiff's affidavit in support (encl 1 of OS 56) where he averred in para 38 thereof that on 12 May 2018 at 10am, during the audience with the first defendant at the Istana, the first defendant had requested for his resignation as Chief Minister and in reply, he insisted that the first defendant execute the said instrument of appointment of the six nominated members and that he would not resign.

**[44]** The first defendant in paras 8–10 of his affidavit in opposition (encl 8 of OS 56) averred that during the audience with the plaintiff at the Istana on 12 May 2018 at 10am he informed the plaintiff that he had received the statutory declaration of six assemblymen from BN-Sabah who had withdrawn their support to the plaintiff as the Chief Minister and as a result the plaintiff had lost the support of the majority of the assemblymen. Hence, he advised the plaintiff to resign but he refused to tender his resignation. The plaintiff did not challenge this averment.

**[45]** Based on the above unchallenged averments of the plaintiff and the first defendant, they amply showed that the first defendant had asked the plaintiff to resign but the plaintiff refused.

**[46]** In *Ningkan*'s case, the Governor of Sarawak on 16 June 1966 received a letter signed by 21 members of the Council Negeri to the effect that the writers

no longer had confidence in the plaintiff, their Chief Minister. The Governor thereupon wrote and informed the plaintiff *on idem* date that from the representations he had received he was satisfied that the plaintiff had ceased to command the confidence of the majority Council Negeri members and invited the plaintiff to resign. The plaintiff in his reply of 17 June 1966 informed the Governor that the Governor's view as to the loss of confidence of the members of the Council Negeri in the plaintiff was not supported by the meeting of the Council Negeri held on 14 June 1966 and the plaintiff in the same letter requested that he be supplied with the names of the persons who had signed the representations. In reply to this letter, the governor in his letter of the same date informed the plaintiff that as the plaintiff has refused to tender his resignation and the resignation of members of the Supreme Council in accordance with art 7(1) of the Constitution of the State of Sarawak, he declared that the plaintiff and other members of the Supreme Council had ceased to hold office and appointed the second defendant as Chief Minister forthwith.

**[47]** The issue before the High Court in *Ningkan*'s case was whether the governor has power of dismissal. The question which arose was how the lack of confidence referred to in art 7(1) of the Sarawak Constitution (pari materia to art 7(1) of the Sabah Constitution) is to be expressed: can such lack of confidence be expressed only by a vote on the floor of the House? The acting Chief Justice, Harley J held:

(a) if the Governor of Sarawak was limited by art 6(3) of the Constitution of Sarawak to appoint as Chief Minister a member of the Council Negri who in his judgment was likely to command the confidence (and approval) of the Council Negri and therefore it followed by s 21 of the Interpretation Ordinance that only when the Council Negri had shown lack of confidence (and lack of approval) could the Governor's power to dismiss, if it exists, be exercised. Under the provisions of the Sarawak Constitution lack of confidence may be demonstrated only by a vote in the Council Negri;

(b) if the Constitution of Sarawak could be construed as giving to the governor a power to dismiss the Chief Minister when he had refused to resign and failed to advise a dissolution then in this case the plaintiff was never given a reasonable opportunity to tender his resignation or to request a dissolution; and

(c) the purported dismissal of the plaintiff by the governor was ultra vires null and void and judgment should be entered as prayed.

**[48]** The above decision in *Ningkan*'s case was followed in *Tun Mustapha*'s case, where Tan Chiaw Thong J (as he then was) held:

A [15] In a case where the appointment of a Chief Minister has been validly made, there is no power for the Head of State to either revoke such an appointment or to dismiss the Chief Minister.

**[49]** The learned judge went on to say:

B However, even on the basis that the matter is *res integra*, I have reached the same conclusion. In this connection, reading Articles 6(3) and 7 of the (Sabah) Constitution together, it seems clear that, whereas the power of appointment is vested in the Head of State alone, who makes his own judgment in this respect, without having to be advised by the Cabinet or anyone else, his power of revocation C of appointment and dismissal is solely conferred by Article 7(2) and (3); and, in this regard, as distinct from members of the Cabinet other than the Chief Minister, the latter does not hold office at the pleasure of the Head of State. In this regard, if it is intended that the Head of State should have a limited power of revocation of appointment or dismissal, provision in the Constitution would clearly have to be D made. As to the argument that Article 7 should be construed to mean that the Head of State may revoke the appointment of or dismiss a Chief Minister before the latter has the approval of the majority of members of the Legislative Assembly, this, in my view, would run counter to what I consider to be the intention of the Constitution that, after his appointment, the Chief Minister has the legal constitutional right to go to the Legislative Assembly, to be tested whether he in fact commands the E confidence of the majority members thereof. Revoking his appointment before he has an opportunity of exercising that right, in my opinion, is contrary to the constitutional intention, and this is not permitted by the Constitution. Even more so, would this situation apply in the case of dismissal without a vote of no confidence from the House. In other words, I am of the view that, once a valid F appointment of a Chief Minister has been made by the Head of State, he has no power of dismissal, and this is the 'contrary intention' provided for in section 29(3) of the 1963 Ordinance. But what about removal or dismissal for reasonable cause? There is no provision on this in the Constitution. Is it a proper construction of the Constitution to conclude that a power of removal or dismissal for cause should be G implied? In this connection, it is to be observed that 'reasonable cause', or 'for cause' may be considered both under the subjective or objective tests. In my view, it seems clear that, by the absence of express provision in the Constitution giving any power of removal from office or dismissal, the Constitution does not intend that any such power be given to the Head of State; otherwise it would have expressly said so, as in the case of members of the Cabinet other than the Chief Minister. As distinct from H the Indian position, I consider that the scheme of the Constitution is such that if a Chief Minister misconducts himself or there are other circumstances giving rise to reasonable cause for the removal of a Chief Minister, it is left to the good sense and responsibility of the assembly to pass a vote of no confidence against him, and, in the normal case, Article 7(1) requires him to either request the Head of State to I dissolve the assembly, or tender his resignation and that of other members of his Cabinet. In reaching this conclusion, I have borne in mind the relevant principles relating to the proper interpretation of constitutions which I had earlier referred to. Further, 'the only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal

reasoning (per Barwick, CJ in AG of the Commonwealth ex relatione *McKinlay v The Commonwealth of Australia* [1975] 135 CLR 1; 177 ALR 593). (Emphasis added.)

**[50]** In *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah & Ors* [1995] 1 MLJ 169; [1995] 1 CLJ 184; ('*Amir Kahar*'s case') (relied by the defendants), Datuk Joseph Pairin Kitingan ('Datuk Pairin') was appointed Chief Minister of Sabah. On the advice of Datuk Pairin, other elected members from his party, including the plaintiff, were appointed to form the State Cabinet. Subsequently, due to defection of three members of the assembly from his party to the opposition, Datuk Pairin requested the first defendant who was the governor to dissolve the assembly but the first defendant withheld the consent. Datuk Pairin subsequently tendered his resignation as Chief Minister, but he did not tender the resignation of the other members of his Cabinet. Thereafter the first defendant appointed the second defendant as a new Chief Minister to replace Datuk Pairin. The first defendant, acting on the advice of the new Chief Minister, appointed the third to ninth defendants as the other members of the Cabinet of the second defendant. The plaintiff sought the declaration, inter alia, that since no motion of no confidence was ever tabled in the assembly against Datuk Pairin, his resignation was personal to him and did not affect the appointment of the plaintiff as a Deputy Chief Minister and Minister of Agriculture and Fisheries.

**[51]** Abdul Kadir Sulaiman J (as he then was) opined:

(2) A vote in the assembly is not the only means to determine the confidence of the members of the assembly in the Chief Minister but depends on the circumstances. Other extraneous matters may provide sufficient evidence to establish the fact of the Chief Minister ceasing to command the confidence of a majority of the members of the assembly for the purposes of art 7(1) of the Constitution.

**[52]** The learned judge in *Amir Kahar*'s case went on to say that *Ningkan*'s case was distinguishable as being a decision based on its own facts and circumstances. In *Ningkan*'s case the alleged loss of confidence was highly suspect. The top secret representation made by persons outside the Council Negeri on the fact of it did not disclose the representors were the majority of members of the Council Negeri and in respect of those who signed, one of them was represented only by a chop. Further, the letter was not signed by all the persons listed in the letter. Thus, the trial judge said: 'Men who put their names to a 'Top Secret' letter may well hesitate to vote publicly in support of their private views'. On the same day the letter was written, there was a meeting of the Council Negeri and Bills were passed without opposition. Also on that day, there was no motion of confidence put in the Council Negeri nor had there been any defeat of a Government Bill. In contrast, there were 30 members

against the PBS's elected members expressing their no-confidence in the Chief Minister which clearly indicated mathematically beyond question that the BN was in the majority and those majority had ceased to have confidence in him.

**[53]** In *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v Dato' Dr Zambry Abdul Kadir* [2009] 1 LNS 316 ('the *Perak* case (HC)'), as a result of the three resignations of members of the State Legislative Assembly, neither of the two alliance groups in the State Legislative Assembly ('LA'), ie, the PAKATAN nor the Barisan Nasional ('BN') had a clear majority to form a legitimate Government as of 3 February 2009. The applicant wrote a letter to the Sultan of Perak ('HRH') requesting for the dissolution of the LA. HRH met the three members of the LA who had resigned and the 28 other members of the LA who were aligned to BN on 5 February 2009 at the Istana to ascertain their support for the BN. Having satisfied himself to the fact, HRH informed the applicant that the applicant's request for dissolution was refused and he was to tender his resignation immediately as Chief Minister of Perak together with his Executive Council. The applicant refused on the ground that there was no vote of no-confidence against him. The office of HRH then issued a media statement which, amongst others, deemed that the office of the Chief Minister of Perak was vacated pursuant to art XVI(6) Perak State Constitution. The respondent was subsequently appointed by HRH as the Chief Minister of Perak. The applicant sought judicial review of the appointment.

**[54]** In the well-considered judgment of Abdul Aziz Rahim J (as he then was), with regard to the issue how to determine that the applicant had ceased to command the confidence of the majority of the LA for the purpose of art XVI(6) Perak Constitution (pari materia to art 7(1) Sabah Constitution), His Lordship uttered:

> In my view it is alright if His Royal Highness takes upon himself to determine who commands the confidence of the majority in the State Legislative Assembly that he can appoint as the Menteri Besar. Such determination however is only good for the purpose of appointing a Menteri Besar pursuant to Article XVI(2) (a) Perak State Constitution. This is so because that provision speaks of 'who in his judgment is likely to command the confidence of the majority'. The language used therein requires the exercise of a personal judgment on the part of His Royal Highness.
>
> But the same thing cannot be said with regard to Article XVI(6) in deciding whether the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly. In this case His Royal Highness, through his enquires has judged that the respondent has the support of the majority. But that finding does not necessarily means His Royal Highness can form an opinion that the applicant ceases to command the confidence of the majority of the members of the legislative. One reason for this is that the expression 'in his judgment' is not used in Article XVI(6). It is trite that in construing a provision of a Constitution or a statute every word used in the Act or section or clause must be given its plain and ordinary meaning. If a clause or sub-section in the same section of the Act is worded

differently on the same issue, such as in relation to the issue of command of the confidence of majority in this case, then the clause or sub-section must be read in such a manner with regard to the same issue to give effect to the difference in the wordings. On this premise I am of the view that just because His Royal Highness had formed a judgment that the respondent is likely to command the confidence of the majority for the purpose of Article XVI(2)(a) to appoint the respondent as Menteri Besar it does not mean that His Royal Highness opinion or judgment is applicable in deciding that the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly. In another word, one cannot say that because His Royal Highness has judged that the respondent is likely to command the confidence of the majority in the Legislative Assembly therefore the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly. I would say that the personal opinion or judgment of His Royal Highness is irrelevant to the construction of Article XVI(6). The second reason is that Article XVI(5) Perak State Constitution states that the Executive Council shall be collectively responsible to the Legislative Assembly. Under Article XVI(2)(a) the Menteri Besar is appointed to preside over the Executive Council. Article XVI(6) speaks of 'If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly ...'. Reading these three provisions in Article XVI Perak State Constitution it is logical and in fact Article XVI(6) requires it to be so, that it is the Legislative Assembly that determines whether it has confidence in the Menteri Besar as the Head of the Executive Council. The Legislative Assembly may make the determination through a vote of no confidence against the Menteri Besar. (Emphasis added.)

**[55]** In *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464; [2009] 5 CLJ 265 ('the *Perak* case (CA)'), the Court of Appeal reversed the decision of the High Court and in relation to the second issue whether the High Court Judge was right in holding that there must be a motion of no confidence before a Chief Minister can be determined to have ceased command of the confidence of the majority, the Court of Appeal speaking through Raus Sharif JCA (as he then was) held:

[320] In view of these, the question arises. Is a motion taken on the floor of the assembly/Parliament to determine loss of confidence of a majority members a convention in this country? And therefore binding?

[321] Quite apart from the notable absence of such express and imperative terms in the Federal Constitution, as well as in art 7(1) of both Sabah and Sarawak Constitutions and art 11 XVI(6) of the Perak State Constitution, the authorities themselves do not reflect the existence of such a convention.

[322] The lone 'precedent' in *Ningkan* (and to some extent in the *Datu Tun Mustapha* case), as opposed to the contrary view held in *Adegbenro* and *Amir Kahar*, could not possibly in my view, make the ruling on this 'loss of confidence' issue in *Ningkan* a convention which is obligatory and binding.

[323] The very fact that a subsequent ruling departed from the *Ningkan* ruling

defies its very status as a convention. The *Ningkan* phenomenon stands all by itself. In other words, a single swallow does not make a summer.

[324] In view of the circumstances above, I disagree with the learned judge that the *Ningkan* decision is applicable in the instant appeal. In fact the *Amir Kahar* decision on the facts are more pertinent.

[325] In *Amir Kahar* the language of art 7(1) of the Sabah Constitution is in pari materia with art XVI(6). Even if *Adegbenro* is said by *Nizar* to be distinguishable, in view of the dismissal being subject to the personal judgment of the Head of State, *Amir Kahar* does not bear that impediment.

[326] In *Amir Kahar*, the said 30 members of the Council Negri expressed on the broadcast media that they no longer had confidence in Datuk Pairin. Though they requested the governor to convene the assembly to table a motion of no confidence, this was pre-empted by the resignation of Datuk Pairin. Datuk Pairin recognised the time honoured convention that when he loses the confidence of a majority of members of the Council Negri, the honourable thing to do is to tender his resignation. Due to defection of his PBS members to Barisan Nasional, the Barisan Nasional now had a majority. He tendered his resignation, paving the way for Barisan Nasional to form the next government. (Emphasis added.)

It can be observed from the judgment above that the Court of Appeal has given full weight to the obiter of the learned judge in *Amin Kahar* case.

**[56]** In the *Perak* case, the Federal Court dismissed the appeal by Nizar, speaking through Arifin Zakaria CJ (Malaya) (as he then was), held:

(3) There is nothing in art XVI(6) or in any other provisions of the State Constitution stipulating that the loss of confidence in the CM may only be established through a vote in the LA. Evidence of loss of confidence in the CM may be gathered from other extraneous sources provided, they are properly established. Such sources, should include the admission by the CM himself and/or representations made by members of the LA that the CM no longer enjoys the support of the majority of the members of the LA. There was evidence of such admission by the appellant himself and from the demonstration of support by the 31 members of the LA for BN. Hence, giving BN a clear majority in the LA. All these clearly pointed to the loss of confidence of the majority of the members of the LA in the leadership of the appellant as the CM (see para 48).

**[57]** It is crystal clear from the decision of our apex court in the *Perak* case that there is no mandatory requirement that there must be a motion of no confidence passed in the assembly against a Chief Minister before he ceases to command the confidence of the majority of the member. This fact can be established through extraneous sources which are properly established.

**[58]** The relevant art XVI(6) Perak Constitution is pari materia to art 7(1) Sabah Constitution. Article XVI(6) of the Perak Constitution states:

If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then unless at his request, His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

**[59]** Similar to art XVI(6) of Perak Constitution, art 7(1) of Sabah Constitution also does not have express provision that there must be a motion of no confidence to be tabled in the assembly to determine that the Chief Minister has lost the confidence of the majority of the assembly.

**[60]** Although the facts in the *Perak* case and the present case are not identical, that Perak has monarchy constitution and that there is no similar provision in Perak Constitution as art 10(4) of the Sabah Constitution as submitted by the plaintiff, they do not, in my view, thereby distinguished the *Perak* case and render the said case inapplicable to the present dispute.

**[61]** The legal principles established by the *Perak* case are in my view clearly applicable to our case as the *Perak* case was concerned with the interpretation of art XV1(6) of the Perak Constitution which is pari materia or identical to art 7(1) of the Sabah Constitution in determining the same issue raised in both cases ie, who is the legitimate Chief Minister.

(c) Whether there is extraneous evidence in support of the plaintiff's loss of confidence of the majority of the members of the assembly?

**[62]** Learned counsel for the plaintiff submitted that the standard of proof required before an incumbent Chief Minister can be said to have lost the confidence of the majority is that there must be an overwhelming body of evidence garnered, either the vote of no confidence in the assembly (*Ningkan*'s case) or from the extraneous sources (the *Perak* case). Only in 'truly exceptional circumstances' can an incumbent Chief Minister be required to resign. In the absence of a vote of no confidence in the assembly, the high standard of proof to unseat an incumbent Chief Minister must include: (a) an admission by the incumbent of loss of confidence of the majority; and (b) unambiguous and consistent statements by the assemblymen that the Chief Minister has lost their support.

**[63]** Learned counsel for the plaintiff submitted that the present case has not met the high standard of proof. In the present case, the plaintiff never requested for a dissolution of the assembly nor did he expressly admit that he had lost the confidence of the majority assemblymen. Further, the six defected assemblymen from BN-Sabah had committed perjury in their statutory declaration (exhs TYT3–TYT8 of encl 8) in which they gave their support to the second defendant as the Chief Minister because in their earlier statutory

declarations (exh MBHA1 of encl 50) given less than 48 hours ago, they too had supported him as the Chief Minister. Also, in a press conference, they had openly and publicly declared their support for the plaintiff. In the absence of overwhelming evidence that the plaintiff had ceased to command the confidence of the majority of the assemblymen, the first defendant ought not have interfered and ought to allow the matter to resolve itself at the assembly.

**[64]** I respectfully do not agree that the *Perak* case or *Ningkan*'s case have laid down the alleged standard of proof contended by the plaintiff, ie, exceptional circumstances with overwhelming evidence to justify the TYT to require for resignation from the Chief Minister. In this connection, it is helpful to refer to *Amir Kahar*'s case where reference was made to *Adegbenro*, in which Viscount Radcliff had this to say about the extraneous resources which may be relied on to determine whether a Chief Minister has lost the confidence of the majority of the assembly:

> Based on what was said by Viscount Radcliffe in the case, the evidence that a Chief Minister ceases to command the confidence of the majority of members of the assembly for the purpose of art 7(1) of the Sabah Constitution, may be found from other extraneous sources and are not confined to the votes taken in the Legislative Assembly provided that, those extraneous resources is properly established. (Emphasis added.)

**[65]** I am unable to agree with the plaintiff that the six assemblymen who defected from BN-Sabah had committed perjury as alleged, because exh MBHA1 are letters addressed to the first defendant expressing their agreement for the plaintiff to be the Chief Minister. They are not statutory declaration because they are not drawn up in compliance with the format as required in the Schedule to the Statutory Declaration Act 1960.

**[66]** Although the allegiance pledged in these six statutory declarations came in less than 48 hours after they had agreed to have the plaintiff being appointed as the Chief Minister, in absence of allegation that these statutory declarations are fabricated and made under duress, I find they are extraneous source which is properly established.

**[67]** Although the plaintiff did not request for dissolution of the assembly nor did he ever admit loss of confidence of the majority during the audience with the first defendant on 12 May 2018, the first defendant can reasonably rely on the six statutory declarations (exhs TYT3–TYT8 of encl 8 of OS 56 to form a judgment that the plaintiff had lost the confidence of the majority of the assembly. Accordingly, the first defendant requested the plaintiff to tender the resignation of the State Cabinet.

(d) Whether, by the plaintiff's refusal to resign, the plaintiff is deemed to have vacated the Chief Minister post? A

**[68]** The Federal Court in the *Perak* case (FC) held:

> [55] Similarly here, on the literal interpretation of art XVI(6), we are of the view that the word 'shall' should be given a mandatory effect. Therefore, it is incumbent upon the appellant in the circumstances of this case to tender the resignation of the executive council. The term executive council by definition includes the MB (see art XVI(2)).We, therefore, agree with the respondent that the refusal on the part of the appellant to resign after being directed to do so by HRH clearly went against the express provisions of art XVI(6). It cannot be the intention of the framers of the State Constitution that in the circumstances, it is open to the appellant whether to resign or to stay as MB. The word 'shall', in our opinion ought to be given a mandatory effect, otherwise, it would lead to political uncertainty in the state. The appellant cannot continue to govern after having lost the support of the majority. To allow him to do so would be going against the basic principle of democracy ...
>
> [56] (c) as for the third question our answer is that if the MB refuses to tender the resignation of the executive council under at XVI(6) the MB and the executive council members are deemed to have vacated their respective offices.

B C D E

**[69]** The Federal Court in the *Perak* case had, therefore, established the following principles of law which, upon application to the present dispute, means:

(a) that the word 'shall' in art 7(1) Sabah Constitution should be given a mandatory effect and it was incumbent, therefore, on the plaintiff who having lost the confidence of the majority of the members of the assembly, to tender the resignation of the State Cabinet. The term Cabinet includes the Chief Minister. The plaintiff's refusal to resign after being requested to do so by the first defendant clearly went against the express provisions of art 7(1); and F G

(b) since the plaintiff refused to tender the resignation of the State Cabinet under art 7(1), he and the members of the State Cabinet are deemed to have vacated their respective offices, paving way for the new Cabinet to be formed. H

**[70]** As such, the dissolution of the State Cabinet under art 7(1) does not involve the TYT or necessarily, the members of the assembly (see *Amir Kahar*, p 184 para A). I

**[71]** In the premise, the issue that the first defendant had acted ultra vires by dismissing the plaintiff does not even arise by reason that the Chief Minister is

deemed to have vacated his post when he refused to tender his resignation after having ceased to command the confidence of the majority of the members of the assembly.

**[72]** For all the reasons aforesaid, my answer to issue No (i) is in the negative.

*Issue No (ii): Whether the appointment of the second defendant is ultra vires, null and void?*

**[73]** Based on the high authority of the *Perak* case, the clear answer to issue No (ii) is in the negative. In the light of the decision of *Amir Kahar* which was approved by the Court of Appeal and upheld by the Federal Court in the *Perak* case, it is clear that when the Cabinet including the Chief Minister is deemed to have vacated their posts, it paved the way for the first defendant to appoint the second defendant to replace the plaintiff pursuant to art 6(3) Sabah Constitution. As the Chief Minister was deemed to have vacated his position after his refusal to tender his resignation, the subsequent appointment of the second defendant does not give rise to a preposterous situation of two Chief Ministers.

OTHER ISSUES

*Whether the TYT's exercise of power under art 6(3) of the Sabah Constitution to appoint the Chief Minister is non-justifiable?*

**[74]** On behalf of the second defendant, it was submitted that 'the repository power of the TYT to appoint the Chief Minister or to withhold the pleasure contemplated in the State Constitution are exclusive pleasure-cum-discretion of the TYT'. This exercise of discretion of the TYT under art 6(3) of the State Constitution is an absolute exercise of a prerogative power. As it is the sole and exclusive authority of TYT to appoint the Chief Minister, it cannot be questioned in court of law, citing *Mahabir Prasad Sharma v Prafulla Chandra Ghose And Ors* AIR 1969 Cal 198 and *Jogendra Nath Hazarika v State of Assam And Ors* AIR 1982 Gau 25.

**[75]** In *Tun Mustapha* case, at p 471, Tan Chiaw Thong J (as he then was) uttered:

> It was submitted that under art 6(3), the 'judgment' of the Head of State is, by virtue of art 10(2), confided solely in him; and cannot be scrutinised or reviewed by the court. In this respect, I would observe that this may be accepted to be so, provided that the constitutional validity, as distinct from the propriety, of the judgment is not called in question. In the former case, by virtue of the authorities to which I had referred to earlier, it is the function of the court to examine the evidence in order to decide whether, in making his judgment, the head of State had acted contrary to, or

not in compliance with, art 6(3). As stated earlier, art 6(3) does not authorise the Head of State to act outside the relevant constitutional provisions.

**[76]** Guided by the above authority, it is plain and clear that the constitutional validity of the judgment of the TYT can be called into question and justiciable. That, as can be seen, was exactly what the plaintiffs in *Ningkan*'s case, *Tun Mustapha*'s case and the *Perak* case, sought to do, that is, challenging the constitutional validity of the judgment of the TYT or HRH that they had lost the confidence of the majority of the members of the assembly.

*Appointment of six nominated members*

**[77]** The plaintiff complained in his affidavit in support that by reason of first defendant's failure to appoint the six nominated members upon his advice, he lost the majority.

**[78]** There is no merit in this assertion. The legal position of the six nominated members will not be taken into account in determining whether the Chief Minister had commanded the majority of the assembly is clearly enunciated in the case of *Tun Mustapha*. Justice Tan Chiaw Thong uttered at p 421:

> The Head of State may not constitutionally take into account any nominated member for the purpose of making his judgment in the choice of the Chief Minister; nor can he constitutionally take any of them into consideration for the purpose of inflating the seats of a party having a minority of elected seats, in order to secure a majority over a party with the majority of elected seats. If he does so, such a judgment 3 would not be in accordance with the requirements of Article 6(3) of the Sabah Constitution.

*Public policy*

**[79]** Learned counsel for the plaintiff submitted that in applying the organic or purposive approach to interpret art 6(3), the court should have regard to the social condition and difficulties facing the State of Sabah. In Sabah, many a time electors were betrayed by unscrupulous Assemblymen who switched their political allegiance for personal gains. It was submitted that a correct interpretation of art 6(7) would greatly reduce, if not eliminate, party hoping Assemblymen and serve the very purpose of the now repealed art 18(2)(d) ie, anti-hopping provision. It will also minimise political uncertainty which are created when democracy is defeated and leaving it to the TYT to determine whether the Chief Minister has ceased to command the confidence of the majority of the assemblymen.

**[80]** It cannot be gainsaid that party hopping create undesirable political uncertainties besides making the voters who had cast their votes in favour of a candidate, who then decided to party-hop after winning, feel betrayed. It also cast aspersion on the candidates who party-hop after winning. Be that as it may, the issue of party hopping is not in the arena for the court's determination in this dispute and it is best left to the wisdom and the will of the Parliament to stop it.

*Whether the dispute raised in OS 56 is academic?*

**[81]** Learned counsel for the second defendant submitted that the State Legislative Assembly, at its first sitting on 11 June 2018, had decided to support the second defendant to be the Chief Minister after 44 of the State Assemblymen present had pledged and declared their support for the second defendant. This vote taken by the Legislative Assembly had, therefore, reaffirmed that the second defendant clearly commands the confidence and support of the majority of the members of the Legislative Assembly which had increased from 35 (on 11 May 2018) to 44 (on 11 June 2018). The proof of the support of the 44 Assemblymen is evidenced by their statutory declarations adduced as exhs 'DSSA3' and the news report of the sitting adduced as exh 'DSSA6' annexed to the second defendant's affidavit in opposition.

**[82]** For this reason, submitted counsel for the second defendant, this dispute is clearly no longer a live issue but has become academic because, regardless of the outcome of this originating summons, the second defendant will remain and will continue to be the Chief Minister as was decided by the Legislative Assembly on 11 June 2018.

**[83]** Learned counsel for the second defendant next submitted that it is trite that no court of law would grant any of the declaratory orders that the plaintiff is seeking because the dispute is not a live issue but has clearly become academic, citing *Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] 3 MLJ 543; [2017] 3 CLJ 88, *Yong Teck Lee & Ors v The Prime Minister of Malaysia, Najib bin Razak & Anor* [2018] MLJU 790; [2018] 1 LNS 787, *Datuk Syed Kechik Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors And Another Application* [1999] 1 MLJ 257; [1999] 1 CLJ 325.

**[84]** I agree with learned counsel for the plaintiff who submitted that the general proposition that the court will not consider academic dispute is subject to exception as stated in *R v Secretary of State for the Home Department* [1999] 1 AC 450 at pp 456–7:

> My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordship has a

> discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. ...
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and the appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arise which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

**[85]** Notwithstanding that the assembly had convened its first sitting on 11 June 2018 and that 44 assemblymen had pledged and declared their support for the second defendant, which reaffirmed that the second defendant commanded the confidence of the majority of the members of the assembly, my view is that it comes within the exception described in *R v Secretary of State for the Home Department*. Thus, it does not render the issues before the court academic as it involves a constitutional issue pertaining to the appointment of the second defendant and it is of high public interest that the court should deliver a ruling on it to settle the issue for the interest of the public.

CONCLUSION

**[86]** For all the reasons aforesaid, I dismiss OS 56 with costs of RM30,000 for the defendants to be divided accordingly.

OS 57

**[87]** As in OS 56, the plaintiff in OS 57 is seeking declaration that the plaintiff is and remains the lawful Chief Minister of Sabah. He claimed that he is and remains the lawful Minister of Local Government and Housing of the State Cabinet. He is also challenging the legality of the swearing in of the first defendant as the purported Chief Minister of Sabah and the appointment of the State Cabinet nominated by the first defendant as the purported Chief Minister.

**[88]** In OS 56, I have earlier held that, on the authority of the *Perak* case, the first defendant was allowed to rely on extraneous resources, besides a vote of no confidence by the assembly, to determine whether the plaintiff had ceased to command the confidence of the majority of the members of the assembly and that the first defendant, based on the six statutory declarations affirmed by the six assemblymen who pledged their allegiance to the second defendant, was convinced that the plaintiff had lost the confidence of the majority which triggered the provision in art 7(1). Thus, first defendant requested the plaintiff to tender the resignation of the members of the Cabinet. Upon the refusal by

A the plaintiff to do so, the members of the Cabinet including the plaintiff herein are deemed to have vacated their position. This effectively means the whole Cabinet including the plaintiff in OS 57.

B **[89]** In the premise, I dismiss OS 57 with costs of RM15,000 to both defendants to be divided accordingly.

*Order accordingly.*

Reported by Ashok Kumar

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